

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 81 OF 2007

Seth Keshavji Jadhavji Trust ...Petitioner
V/s.
Shri Jayantilal Damji Pandit & Anr. ...Respondents

Mr.Arshad Shaikh with Mr.Sanjay Udeshi i/b. M/s.Sanjay Udeshi & Co. for the Petitioner.
Mr.Pankaj Kowli i/b. Imtiaz A. Raibakker for the Respondents.

CORAM : V.M. KANADE, J.

DATED : MARCH 20, 2007

P.C. :-

1. Heard the learned Counsel for the petitioner and the learned Counsel for the respondents.

2. The petitioner is challenging the order passed by the Controlling Authority under the Payment of Gratuity Act which was made by it in Misc.Application which was preferred for setting aside the exparte order which was passed by the said authority.

3. The learned Counsel for the petitioner has submitted that the Controlling Authority has committed an error of law which is apparent on the face of record

holding that the review application is not maintainable. He submitted that Rule 11 sub-clause 5 clearly permits the parties against whom exparte order is passed, to move an application and if sufficient cause is shown by him for remaining absent, the Controlling Authority has the power of recalling its earlier order and decide the case on merits.

4. He has submitted that the Controlling Authority also has erred in recording a finding that on merits also, no case is made out by the petitioner by observing that the Advocate who was examined by the Trust was not available for cross-examination.

5. The learned Counsel for the petitioner has submitted that without making an issue about the said finding which is recorded by the Controlling Authority, he makes a statement that the said witness would be available for cross-examination on any particular date which is fixed by the Controlling Authority.

6. The learned Counsel on behalf of the respondents, on the other hand, submitted that the Controlling Authority had apart from deciding the question of maintainability of the application, has also decided the case on merits and has also relied on para 7 of the said order. He has submitted that this Court should not interfere with the impugned order while exercising its writ jurisdiction.

7. In my view, considering the provision of Rule 11 Sub-clause 5, the said authority has clearly committed an error of law which is apparent on record.

8. It would be relevant to refer to the said provision in Rule 11(5) which reads as under :-

"11. xxxxxx

(5) If the employer concerned fails to appear on the specified date of hearing after due service of notice without sufficient cause, the controlling authority may proceed to hear and determine the application ex-parte. If the

applicant fails to appear on the specified date of hearing without sufficient cause, the controlling authority may dismiss the application:

Provided that an order under this sub-rule may, on good cause being shown within thirty days of the said order, be reviewed and the application re-heard after giving not less than fourteen days' notice to the opposite party of the date fixed for rehearing of the application."

9. A perusal of the said provision clearly shows that proviso to the said Rule contemplates that on exparte order being passed, the party against whom the said order is passed has a remedy of approaching the same forum and the said authority, if it is satisfied that sufficient cause is shown by the party, in that case, it is for competent authority to set aside or recall its earlier order.

10. The authority, therefore, erred in holding that

the review application is not maintainable.

11. Apart from that, so far as the merits of the case are concerned, the authority has not considered at length the case of the petitioner but has merely stated in para 7 of its order that the witness who was examined by the Trust was not available for cross-examination and on that footing held that the petitioner did not have any case on merits. In my view, such a course of action was not open to the authority and it ought to have discussed the entire case on merits and could have decided or in any case, it ought to have considered the application for setting aside the exparte order and thereafter, decided the case on merits.

12. The impugned order, therefore, viewed from any angle is liable to be set aside and quashed.

13. In the result, writ petition is allowed. The order passed by the Controlling Authority at Exhibit H in Misc.Application (PGA) No.6 of 1993 dated 21.3.2005 is set aside. The Controlling Authority is directed to

decide the said Misc.Application afresh and if it is satisfied with the reasons given by the petitioner on the said Misc.Application, may decide the main application also, expeditiously. In any event, the Controlling Authority shall complete this exercise on or before 30th June, 2007.

14. Petition is made absolute in the above terms.

15. Needless to mention that the order of stay which is granted during the pendency of this proceeding shall continue till the final disposal of the Misc.Application.

(V.M. Kanade, J.)